

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

UNITED STATES OF AMERICA)
)
 v.) CR. NO. 2:07cr089-MHT
)
SAUL HERNANDEZ-CORTEZ)

UNITED STATES' RESPONSE TO MOTION TO REDACT
PORTIONS OF PRE-SENTENCE REPORT

Comes now the United States of America, by and through Leura G. Canary, United States Attorney for the Middle District of Alabama, and files the instant Response to Defendant Saul Hernandez-Cortez's Motion to Redact Portions of Pre-Sentence Report (Doc. # 35) as follows:

Defendant urges the Court to strike paragraph 9 of the Presentence Report ("PSR") completed by Senior United States Probation Officer Jacquelyn P. Caple. (Doc. # 35.) Paragraph 9 of the PSR details a possible obstruction of justice account involving Defendant which occurred at the Montgomery City Jail pending Defendant's sentencing.¹ As stated by defense counsel in the motion, Senior United States Probation Officer Jacquelyn P. Caple "recounted" the event and concluded that "there is no information to suggest the defendant obstructed or impeded or attempted to obstruct or impede the administration of justice." (*Id.* at ¶¶ 2, 3.) Defendant seeks to redact this information in the PSR on the grounds that said information is "irrelevant to the determination of the sentence to be imposed by this Honorable Court" and its inclusion "could" cause Defendant to suffer "undue hardship, difficulties, and be subject to prejudicial treatment while with the Federal

¹ As described in paragraph 9 of the PSR, on June 22, 2007, two hacksaw blades were recovered from mail matter addressed to Defendant at the Montgomery City Jail. According to the United States Sentencing Guidelines, attempting to escape from custody before sentencing constitutes obstruction of justice sufficient for application of the §3C1.1 adjustment. *See* U.S.S.G. §3C1.1, Application Note 4 (2007).

Bureau of Prisons.” (*Id.* at ¶¶ 5, 6.)

The United States submits that Defendant’s motion is without merit and is due to be denied. First, Rule 32 of the Federal Rules of Criminal Procedure requires that the PSR contain “any circumstances affecting the defendant’s behavior that *may be helpful* in imposing sentence or in correctional treatment.” Fed. R. Crim. P. 32(d)(2)(iii) (emphasis added). Information regarding a possible escape attempt from custody prior to sentencing certainly falls within those parameters. Second, contrary to defense counsel’s assertion, the information in paragraph 9 is relevant for sentencing purposes as it pertains to Defendant’s alleged involvement in another possible criminal offense: attempted escape from federal custody. *See* 18 U.S.C. § 751(a). Third, any potential harm from the inclusion of such information is mitigated by the inclusion of the fact that the investigation of that conduct was closed due to lack of evidence, and there were no findings establishing Defendant’s knowledge, participation or cooperation in the incident. Hence, the information in paragraph 9 of the PSR is fairly presented and does not unfairly prejudice Defendant. Finally, Defendant’s motion relates to the inclusion of the attempted escape information in the PSR, not the factual accuracy of the information.² This Court should decline to censor accurate information simply because it may be used to Defendant’s disadvantage by prison officials. “Neither due process nor Rule 32 requires a district court judge to be an editor as well as an arbiter of justice.” *United States v. Turner*, 898 F.2d 705, 710 (9th Cir.1990), *cert. denied*, 495 U.S. 962 (1990).

Based on the foregoing, the United States respectfully requests that the Court deny Defendant’s motion to redact portions of presentence report.

² Notably, Defendant does not argue that this information should be excluded pursuant to Rule 32(d)(3).

Respectfully submitted this the 13th day of November, 2007.

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CERTIFICATE OF SERVICE

I hereby certify that on November 13, 2007, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

Daniel G. Hamm.

Respectfully submitted,

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